DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions of the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	

REPLY COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC.

J. Manning Lee
Vice President, Regulatory Affairs
718-355-2671

Teresa Marrero
Senior Regulatory Counsel
Teleport Communications Group Inc.
One Teleport Drive, Suite 300
Staten Island, NY 10311
718-355-2939

May 30, 1996

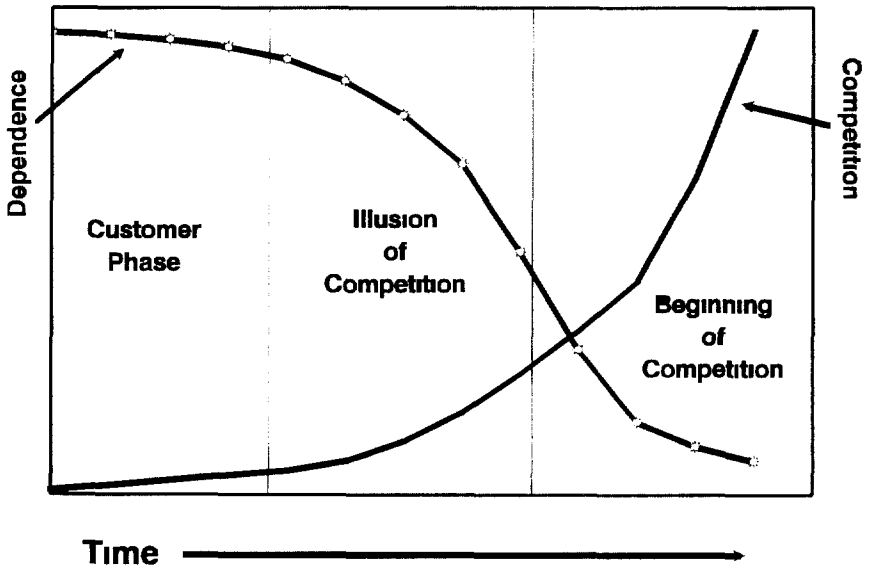
No. of Copies rec'd 0+6
List ABCDE

SUMMARY

In order to achieve Congress' vision of facilities-based competition through negotiated agreements, the Commission must adopt clear national standards -- "Preferred Outcomes." These standards will give Competitive Local Exchange Carriers ("CLECs") some bargaining ability in their negotiations with the Incumbent Local Exchange Carriers ("ILECs").

CLECs are today, and will remain for the near future, overwhelmingly dependent on the ILECs. Effective competition cannot begin until that dependence wanes. The graph below illustrates the relationship between the CLEC's dependence on the ILEC and the degree of competition faced by the ILEC.

CLEC Dependence on ILEC vs. Degree of Competition



Today, the CLECs face an overwhelming dependence on the ILEC -- virtually 100% of their local switched calls must be completed on the ILEC's network. The CLECs are, to a large extent, in the position of "customers" of the ILEC, rather than competitors -- their dependence is so extensive and the proportion of their revenues paid to the ILECs is so large, that they do not represent a true competitive counterbalance. As time goes on and end users are brought directly on the CLEC networks, without being dependent on the ILEC, the degree of dependence will lessen, but still competition will be more an illusion than a reality. It is not until the CLECs substantially lessen their relative dependence on the ILEC that true facilities-based competition can be considered to have begun.

The Commission's challenge in this proceeding is to take CLECs from their current state -- a near total dependence on the ILEC and a customer-type status -- through the transition to the beginnings of real competition. In its initial comments, TCG spelled out how the use of a "Preferred Outcomes" approach will permit this evolution to occur, by providing the CLECs with some bargaining leverage to take into their negotiations and arbitrations. A key element of those preferred outcomes is to select "bill and keep" as the transport and termination method of choice, at least until ILECs can demonstrate with specificity the "additional costs" of transporting and terminating such calls.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions of the	)	**CC Docket No. 96-98**
Telecommunications Act of 1996	)	

REPLY COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC.

Teleport Communications Group Inc. ("TCG") offers the following Reply to the May 16, 1996 Comments filed in the above-captioned proceeding, regarding the implementation of the Telecommunications Act of 1996 ("1996 Act").

I. INTRODUCTION

The initial Comments in the Commission's landmark Local Competition inquiry provide a broad range of opinions to guide the Commission. The Department of Justice, long experienced in the ways of monopolists, provides clear eyed and realistic recommendations. The United States Telephone Association and the Incumbent Local Exchange Carriers, having lived too long amongst monopolists, for the most part provide recommendations designed to stifle the development of competition.

There is, however, a basic consensus among a broad range of sensible parties on many of the recommendations made by TCG in its Comments on the important issues that must be resolved for the Telecommunications Act of 1996 to become a reality. There is, for example, a broad recognition that Competitive Local

Exchange Carriers ("CLECs") lack any real bargaining power in their negotiations with the Incumbent Local Exchange Carriers ("ILECs"). The Department of Justice notes that there is a long history of "bad faith" negotiations by monopoly telephone companies, and that this history continues today. It therefore recommends that the FCC articulate "clear national standards, [which] by narrowing the range of permissible outcomes, will reduce the ILECs' ability to use their superior bargaining power to retard competitive entry."[1]

TCG proposed an approach to address this imbalance in bargaining power: the use of "Preferred Outcomes," giving the CLECs a basic set of entitlements as a counterbalance to the ILEC's vast market power, with the most important "Preferred Outcome" being the use of "bill and keep" for transport and termination. Properly implemented, this approach can help the CLEC industry reduce its now-overwhelming dependence on the ILECs and evolve to a state where true, facilities-based local competition can begin.

---

[1]Department of Justice at 12.

II. ADOPTION OF A VIGOROUS SET OF PREFERRED OUTCOMES WILL BEST FOSTER THE UNDERLYING GOALS OF THE 1996 ACT.

A. Negotiations Without Federal Mandates Will Unnecessarily Postpone Competition Because of the Inequality of Bargaining Position.

The Department of Justice, along with a variety of other parties, support TCG's position that the Commission should seek to encourage effective bargaining between CLECs and ILECs, leading to individually negotiated agreements that meet the unique needs of various competitors.[2] GTE also advocated the use of preferred outcomes as an aid to negotiation.[3] The Michigan Public Service Commission similarly supported this approach.[4] Pacific Telesis, the RBOC with the most experience with the "preferred outcomes" approach, and notwithstanding the fact that the California "preferred outcome" included bill and keep, also strongly supports it.[5]

As TCG stated in its Comments, the Commission can most efficiently achieve this goal by adopting a clear set of "Preferred Outcomes" that will ensure

---

[2]*See, e.g.*, Department of Justice at 9-10 (FCC should articulate clear, national standards governing issues that are critical to the rapid emergence of competition); MFS Communications Company, Inc. ("MFS") at 5 (strongly endorsing the adoption of uniform, pro-competitive national rules); and Cox Communications, Inc. at 21.

[3]GTE at 12, 17.

[4]Michigan PSC at 4.

[5]Pacific at 6.

that any CLEC has a reasonable opportunity to compete. Absent such an equalizing condition, the CLEC will have little basis on which to bargain -- it will have nothing valuable with which to "bargain" in the negotiation process. The Commission's preferred outcomes will place the CLEC in more equal bargaining position in the negotiation process. TCG explained in its Comments that the FCC should adopt "Preferred Outcomes" that address interconnection arrangements, unbundling requirements, reciprocal compensation for transport and termination, performance standards, appropriate fines for any violation of those standards, and arbitration guidelines.

Not surprisingly, the Comments submitted by many of the ILECs largely argue that the Commission should do next to nothing. Their position thereby serves to underscore the strong need for such national, uniform rules and a more realistic environment for negotiations. For example, several commenters (including most ILECs) assert that the Commission should allow the negotiations to take place without specific guidelines, arguing that negotiations should be unencumbered by federal mandates for specific outcomes.[6] Their passion for such unguided negotiations appears to spring from a theoretical desire that the statute's intended "negotiation model" should be allowed to proceed with as little intervention (or help) from the regulators as possible.

---

[6]*See generally* Comments of Ameritech, SBC, BellSouth, Bell Atlantic, and NYNEX.

The fundamental difficulty with this position is that real "negotiations" cannot take place when there is such a fundamental disparity in the bargaining positions of the parties. The CLECs today are critically dependent on the ILECs for the completion of almost 100% of their calls. The ILECs today are dependent on the CLECs for the completion of almost none of their calls. Fair and impartial negotiated settlements cannot occur given such disparate bargaining positions. The ILECs' insistence that the Commission not adopt standards, and not disturb the "purity" of the bargaining process, is akin to the dealer holding four aces insisting that no one drop out of the game --- when the deck is stacked in your favor you don't want anyone or anything to interfere.

The positions of a number of other parties strongly support TCG's contention that ILECs and CLECs do not come to the bargaining table on equal footing. The Department of Justice states that "There is no basis in economic theory or in experience to expect incumbent monopolies to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent clear legal requirements that they do so."[7] Justice further remarks that "As the Commission suggests (Notice ¶ 31), clear national standards, by narrowing the range of permissible outcomes, will reduce the ILECs' ability to use their superior bargaining power to retard competitive entry."[8]

---

[7]Department of Justice at 9-10.

[8]*Id.* at 12.

Similarly, in recommending that the FCC adopt national rules on interconnection, MFS describes the anticompetitive practices in which the ILECs engaged when implementing collocation. MFS states:

> [T]he Commission's experience with physical and virtual collocation tariffs filed by the ILECs demonstrates that absent a clear national collocation policy, ILECs will engage in practices that are intended to disadvantage competitors who collocate on their premises. For example, when the Commission required that ILECs provide physical collocation and required that they file tariffs, the Commission found evidence of discriminatory pricing (*i.e.*, charging prices for collocation services that were substantially higher than the price charged for comparable special access offerings), discriminatory overhead loadings that were unsupported by cost data and double recovered common costs, and misallocation of general support facilities expenses.[9]

MFS goes on to state that ILECs delayed offering physical collocation in many instances by arguing that it was inconsistent with state policy or by incorporating individual case basis ("ICB") provisions in tariffs which would allow ILECs to discriminate among interconnectors.[10]

The passage of the 1996 Act has not alleviated these anticompetitive practices. MFS describes how U S West has used the 1996 Act as a shield to avoid honoring collocation requests. In a letter to MFS, U S West states "Since Physical collocation is not now tariffed U S WEST will be unable to honor the four requests submitted on May 7, 1996. . . . Additionally, U S WEST will be unable to

---

[9]MFS at 20.

[10]*Id.*

honor [MFS's] request of April 23, 1996 to provide service involving your Renton virtual collocation arrangement for the same reason."[11]

AT&T also recognizes that ILECs have the "ability and overwhelming incentives to refuse to accept any arrangement that would permit effective competition with their monopoly exchange and exchange access services unless they believe that less advantageous arrangements are nearly certain otherwise to be imposed."[12] AT&T's comments confirm TCG's assertions concerning the ability of CLEC to successfully negotiate without national rules and guidelines. As AT&T states: "Indeed, the negotiations with the BOCS to date have been characterized by stonewalling, refusals to provide necessary information and conduct inconsistent with the law that only explicit regulations from the Commission could end."[13]

While insisting that the FCC not provide any national standards or guidelines, many of these same ILECs propose to institute "guidelines" of their own, which will serve to delay the availability of unbundled elements while simultaneously saddling competitors with funding the ILEC's costs of complying with the 1996 Act. For example, in determining what should constitute a "bona fide

---

[11]MFS at Attachment 2. *See also* U S West's responses to MFS's April 23, 1996 Bona Fide Request, MFS Comments, Attachment 2.

[12]AT&T at 7.

[13] *Id.* at 8. AT&T cites, as an example, the fact that some ILECs, including Bell Atlantic and GTE, have failed to identify the services that they would allow to be resold despite the requirements of the 1996 Act. AT&T at 8, fn. 6.

interconnection request," GTE and Pacific recommend that the request include a description of the desired service; a proof that the CLEC has received all appropriate permits; and a statement of the length of time by which all or almost all of any requested unbundled elements will be utilized.[14] After this initial data request, the ILECs will take the time to review the information and to determine if additional information is needed. Any additional information that the ILEC decides is needed will, of course, start the clock over again and further delay the availability of the unbundled element. ILECs further assert that they should be allowed to recover the costs of processing each request from the requestor,[15] thus forcing the competitor to pay for the ILEC's costs of complying with its statutory obligations.

Finally, BellSouth claims that the Commission need not "narrow the range of possible outcomes" due to unequal bargaining power, because it claims that CLECs will benefit from the negotiating strength of AT&T and can obtain the same

---

[14]GTE at 17; Pacific Telesis Group at 18. U S West contends that "it is bad faith for an interconnector to demand that a LEC unbundle its network elements immediately, expending substantial resources in the process, while refusing to provide the LEC with a schedule of anticipated purchase and deployment." U S West at 41. U S West does not explain how a competitor can be accused of "bad faith" for simply availing itself of the interconnection options guaranteed it under the statute, or on what basis US West believes it can attach supplementary conditions to the exercise of those rights.

[15]*See, e.g.*, Bell Atlantic at 16.

interconnection agreement negotiated by AT&T.[16] The claim, however, cannot be accepted for at least four good reasons.

First, press reports indicate that AT&T is making less progress in negotiations than other interconnectors, which certainly calls into question BellSouth's assumption that AT&T will be the standard bearer.[17]

Second, BellSouth assumes that other carriers can simply accept the AT&T agreement and thereby benefit from its bargaining power. While AT&T is a large carrier, in the context of the interconnection negotiations it is debatable how all-encompassing its negotiations will be, particularly with respect to the all-important issue of the transport and termination of local traffic. If AT&T is most interested in a resale entry strategy, for example, it will not need transport and termination and therefore will have little incentive to negotiate the issue vigorously, as compared to the resale and wholesale issues more central to that strategy.

Third, BellSouth's position is directly contradicted by its own comments, which oppose standard interconnection rules and agreements and argue that

---

[16]BellSouth at 6.

[17]At a recent press conference in Chicago, Neil Cox, Ameritech President -- Information Industry Services, reported that Ameritech is negotiating with over ten carriers but that "despite a substantial investment of time, Ameritech's talks with AT&T Corp. have made less progress than the other negotiations." *See* Telecommunications Reports, May 27, 1996, at 2.

individualized contracts are best.[18] BellSouth is thus in the position of arguing that, on the one hand, there should be individual negotiations and individual agreements, while on the other hand it argues that the Commission need not adopt national standards to encourage such individual contracts because everyone can just use AT&T's contract.

Fourth and finally, a number of parties have argued that carriers should only be able to use another carrier's interconnection agreement if they accept it subject to the same terms, conditions, and limitations.[19] Until AT&T actually negotiates an agreement it is unclear whether it will reach an agreement that will contain terms, conditions and limitations that will even make use of that contract possible by other carriers, much less that it will be ideal for their purposes.

These ILEC recommendations and arguments serve to bring home the point that TCG made in its May 16 Comments -- the FCC must establish stringent rules and Preferred Outcomes if the negotiations are to be timely, efficient, and successful. It is clear from the Comments submitted by many of the ILECs, as well as their conduct to date, that without such Preferred Outcomes, the 1996 Act's intent that competition be established quickly and efficiently through the negotiation process will be jeopardized.

---

[18]BellSouth states that "[a]ny attempt by the Commission to 'eliminate potential areas of dispute' would operate to *deprive parties of their legitimate opportunity to negotiate those items in the first instance, and of their right to have those items arbitrated in the second instance."* BellSouth at 12 (emphasis added).

[19]*See, e.g.*, TCG at 54; Ameritech at 97; USTA at 96.

B. Potential Entry Into the InterLATA Market Does Not, in and of itself, Serve to Equalize the Bargaining Power between ILECs and CLECs.

Many of the ILECs also assert that the Commission need not impose national guidelines because equal bargaining positions between ILECs and CLECs already exist.[20] SBC, for example, claims that the "carrot" that the Act provides ILECs for entering the interLATA market is sufficient to incent ILECs to enter into interconnection agreements.[21] If that were so, one would naturally expect that the negotiations process would be well underway, that ILECs would be purposefully and diligently implementing the requirements of the 1996 Act, and that numerous Section 251/252 agreements would have been executed. Recent history proves this is not the case.

Not only have the ILECs not "changed their tune" and become more cooperative with CLECs since the passage of the 1996 Act, in some cases the ILECs are using the 1996 Act as the basis for engaging in clearly anti-competitive actions. One of the most egregious examples of such ILEC conduct has occurred in Oregon. U S West has petitioned the Oregon Public Utility Commission to stay its grant of local exchange authority to ELI, MCImetro, and MFS on the grounds that the grant of local exchange authority was *inconsistent* with the 1996 Act.[22]

---

[20] *See, e.g.*, Comments of Ameritech, SBC, and USTA.

[21] SBC at 11.

[22] Public Utility Commission of Oregon, *Application of Electric Lightwave, Inc., MFS Intelenet or Oregon, Inc., MCI Metro Access Transmission Services, Inc. For a Certificate of Authority to Provide Telecommunications Services in Oregon,* Dkt.

How anyone, even a incumbent telephone company, could seriously contend that the Telecommunications Act of 1996, whose animating purpose is the promotion of local exchange competition, requires a state commission to stay the local exchange authority of its competitors is, to say the least, difficult to comprehend. But clearly the passage of the 1996 Act, rather than serving to direct ILECs into procompetitive paths, has, in the case of U S West, provided it with a basis to seek to roll back even the tentative and modest beginnings of local exchange competition.

Since the passage of the 1996 Act, U S West has not only sought to revoke the operating authority of its competitors, it has systematically and intentionally sought to prevent them from interconnecting at all. Certificated local exchange competitors ELI, MCI and MFS were forced to file "Motions to Compel" against U S West in Oregon and Utah, demanding that the ILEC provide interconnection for the provision of local exchange services. As MCI explained in its Oregon Motion to Compel, "U S WEST representatives indicated that U S WEST was not interested in entering into an interconnection agreement with MCImetro, even though MCImetro has negotiated such an agreement with U S WEST in another state."[23]

No. CP 1, CP 14, CP 15, U S West Communications Inc. Petition for Clarification and Reconsideration (March 12, 1996).

[23]Oregon Public Utility Commission, *Application of Electric Lightwave, Inc, MFS Intelenet of Oregon, Inc., MCI Metro Access Transmission Services, Inc.*, Dkt. No. CP 1, CP 14, CP 15, ELI Motion to Compel at 3 (Feb. 23, 1996) MCImetro Motion to Compel at 4. *See also* Public Service Commission of Utah, *Application of Electric Lightwave, Inc.*, Dkt. No. 94-2202-01, Electric Lightwave, Inc.'s Petition

Similarly, in its Motion to Compel, ELI stated "USWC informed ELI that it would not provide interconnection or enter into any interim arrangements unless or until ELI signs a comprehensive agreement covering all of the items contained in a check list in the recently passed Federal Telecommunications Act of 1996." It was only after ELI filed its Motions in Utah and Oregon that U S West entered into negotiations, and ELI has subsequently withdrawn its motions. MCImetro's Motion in Oregon, however, is still pending.

In Washington, U S West has also attempted to use the 1996 Act as a means of resisting compliance with the state commission's orders requiring that the company file tariffs for local interconnection. The Washington Utilities and Transportation Commission, in an Order released a few days ago, rejected U S West's assertions that Commission-required tariff filings were inconsistent with the 1996 Act and it denied U S West's demand that the parties needed to turn the clock back and begin negotiating interconnection agreements from the beginning. The Commission found that "tariffs aid enforcement of our order and contain general terms and conditions for interconnection which are a predicate to negotiation of individual agreements. The interconnection tariffs that we have required are consistent with the 1996 Act and are not precluded by it."[24]

---

for Agency Action to Require Interconnection and Request for Expedited Hearing, (February 29, 1996).

[24]Washington Utilities and Transportation Docket Nos. UT-941464, *et al.*, Eleventh Supp. Order at 4 (May 15, 1996).

Accordingly, while the ILECs claim that the Commission need not institute Preferred Outcomes or other statements of national policy because they have all the incentives they need to be "reasonable," their conduct clearly shows that the 1996 Act, standing alone, does not prevent anticompetitive conduct.

C. ILEC to ILEC Interconnection Agreements are Subject to the 1996 Act and Must be Made Available to CLECs on Nondiscriminatory Terms and Conditions.

A number of ILECs argue that the arrangements that they enter into with other ILECs are not subject to the 1996 Act, and that these arrangements cannot be made available to CLECs.[25] They largely base this claim on the fact that many of these agreements predated the statute and involve traffic between "non-competing" LECs. Neither of these claims has merit.

First, the statute is clear in its requirement that *all* interconnection agreements, including those entered into prior to the passage of the 1996 Act, must be submitted to the Commission.[26] Indeed, several state commissions have already required the filing of such agreements.[27] Second, there is absolutely no

---

[25]*See, e.g.*, Ameritech at 96; BellSouth at 64; NYNEX at 26-27.

[26]Section 252(a)(1) states that "any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section."

[27]For example, on May 16, the Wisconsin PSC ordered ILECs to file such agreements and make their terms available to CLECs. *So also* Michigan PSC at 7.

distinction to be found in the statute between "competing" and "non-competing" LECs, or between "adjoining" and "overlapping" LECs -- the obligation is to submit all interconnection agreements for the exchange of traffic, and indeed to ensure compliance with the statutory requirement that transport and termination and related services be non-discriminatory Commissions must require that such interconnection agreements be filed and approved.[28]

The Commission must, therefore, make clear, as a national standard, that all such agreements must be filed and approved by State or federal commissions, and furthermore that such agreements are available for use by other LECs. Additionally, any limitations within such agreements to "competing" or "non-competing" traffic or carriers cannot be applied to deny the availability of such agreements to a CLEC.

III. A NECESSARY CORNERSTONE FOR EXPEDITING LOCAL COMPETITION IS MANDATED BILL AND KEEP FOR TRANSPORT AND TERMINATION, AT LEAST UNTIL THE ILEC CAN DEMONSTRATE THE EXISTENCE OF ADDITIONAL COSTS ASSOCIATED WITH TERMINATING A PARTICULAR CLEC'S TRAFFIC.

A. The Commission Should Adopt Bill and Keep as an Interim Transport and Termination "Preferred Outcome."

The Act states that reciprocal compensation for transport and termination of an interconnector's traffic shall not be considered just and reasonable unless:

---

[28]Section 251(c)(2)(D) requires that interconnection be at rates that are "just, reasonable and non-discriminatory."

> "(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities . . .; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[29]

If one thing is clear about the appropriate pricing methodology for reciprocal compensation rate, it is that there is not even a clear consensus on the definitions for the terms used to describe the pricing methodologies, much less a consensus on the correct method to use. The myriad interpretations of this language and the wide variety of cost methodologies recommended by commenting parties thus underscore the need to adopt bill and keep, at least as a interim measure, for transport and termination of an interconnector's traffic.[30]

Many ILECs argue that the Commission should take forward-looking incremental costing concepts such as LIRC or TSLRIC and then load these costs with embedded, historic, book, overhead, profit, and/or "legacy" costs -- virtually any cost that can be named has at least one ILEC proposing that it be included. At the end of the process, however, the results of these machinations will be that the

---

[29]Sec. 252(d)(2)(A).

[30]*See* Comments filed by MFS, Cox Communications, Inc., AT&T, Public Utilities Commission of Ohio, Sprint, Dept. Of Justice, and MCI which support TCG's position that the Commission should adopt Bill and Keep.

forward looking incremental costing models become in essence fully distributed historic costing models -- wolves in sheep's clothing.[31]

Bill and keep as an interim transport and termination "Preferred Outcome" will permit co-carrier interconnections to be adopted. Conversely, efforts to develop an alternative rate, whether flat or usage based, for reciprocal compensation will simply embroil the FCC and state commissions in a complex and frustrating quest for an appropriate methodology which is consistent with the 1996 Act. Bill and keep will allow for successful co-carrier interconnection until ILECs can demonstrate that there are indeed additional costs for terminating an interconnector's traffic.[32] Thus, bill and keep fosters the overarching goal of the 1996 Act to promote local competition as expeditiously as possible and encourages expedited negotiations by establishing a Preferred Outcome for interconnection pricing.

---

[31]For example, BellSouth argues that "a reasonable approximation of the additional costs of terminating such calls" should include joint and common costs, even though there are no such "additional costs" incurred in terminating a call. BellSouth at 70.

[32]As the Public Utilities Commission of Ohio stated in its comments, interim bill and keep measures would "provide state commissions with time to gather information to be able to determine: (a) the actual cost incurred by the ILEC to terminate traffic on its network, and (b) the extent to which traffic flow between carriers is in balance." PUCO at 76-77.

B. Contrary to ILEC Assertions, Bill and Keep Is Consistent with the 1996 Act.

As TCG and several other parties stated in their comments, bill and keep satisfies the 1996 Act's requirements that rates be just and reasonable. In fact, bill and keep is the only transport and termination mechanism expressly acknowledged and condoned by the 1996 Act. The concept that bill and keep represents a form of compensation -- without regard to the level of traffic or relative costs per unit -- has been recognized by several state commissions.[33] More importantly, bill and keep encourages the development of facilities-based local exchange service competition, clearly endorsed by the 1996 Act. Bill and keep encourages economically viable facilities-based competition, is administratively efficient, minimizes competitive distortions, and minimizes carrier conflicts. TCG and several other parties have elaborated on these benefits in the comments filed in this proceeding. Indeed, the Department of Justice urges the Commission to adopt bill and keep as *the* interim solution, and perhaps as a permanent standard for pricing transport and termination as well.[34]

Despite these advantages, several parties, predominately the ILECs, have insisted that bill and keep cannot be required by the Commission even on an

---

[33]*See* TCG Comments at 68-69 and 73-74.

[34]DOJ at 33-34.

interim basis.[35] For example, BellSouth states that because reciprocal compensation is to be determined based on the basis of each carrier's costs, "[m]andatory bill and keep arrangements are unquestionably inconsistent with the plain language of the Act."[36] Bell Atlantic argues that under the 1996 Act bill and keep requires a voluntary agreement between the parties to waive mutual recovery of costs.[37]

As TCG stated in its comments, and as a substantial number of other parties agree, bill and keep is an "arrangement that affords mutual recovery of costs through the offsetting of reciprocal obligations." The Act recognizes that "barter" systems such as bill and keep are acceptable, and that compensation can take forms other than the exchange of monies.

Several parties also argue that bill and keep is improper because there is no contribution to joint and common costs.[38] There is no requirement, either Constitutional or statutory, that every single individual rate element must support

---

[35]*See also* GTE at 55-56 (reciprocal compensation should be predicated on cost-based rates; bill and keep arrangements should not be mandated); SBC at 52 (Bill and keep would not meet the requirements of the Act because it does not ensure the recovery of costs associated with transport and termination); Ameritech at 78 (Bill and keep may not be authorized by a state or federal commission, as it is only allowable pursuant to Section 252(d)(2)(B)(i) if and only if the waiver of payment is voluntary).

[36]BellSouth at 73.

[37]Bell Atlantic at 41.

[38]*See generally* Comments of Ameritech, Bell Atlantic, BellSouth, GTE and NYNEX.

some arbitrary amount of joint and common costs. Moreover, this argument ignores the fact that Section 254 of the 1996 Act, regarding the pricing of universal service, already addresses the cost recovery issues for local service, separate and apart from the pricing of transport and termination under Section 252. Any theory requiring that joint and common costs be incorporated in transport and termination charges ignores the express language of the Act that only the "additional" costs of terminating calls can be considered.

C. Bill and Keep Is Not a Taking of Property Without Just Compensation.

A number of parties, chiefly ILECs, claim that bill and keep is an unconstitutional taking.[39] Bill and keep as a compensation arrangement for transport and termination does not constitute a taking of property without just compensation under the Constitution. Indeed, regulatory commissions in Washington and California have dismissed the identical arguments of incumbent LECs that bill and keep mechanisms constitute an unconstitutional taking of their property without just compensation.[40] As the California Public Utilities Commission noted in adopting its local competition rules, claims that bill and keep

---

[39] *See, e.g.*, GTE at 57-58.

[40] *WUTC v. U S West Communications, Inc.*, Docket Nos. UT-941464, UT-941465, UT-950146, & UT-950265, Sixth Supp. Order (December 1996); *see also Re Open Access and Network Architecture Development of Dominant Carrier Networks*, D.95-09-121 (Cal. P.U.C. September 27, 1995).